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# American Lawyers and International Competence

Dr. Charlotte Ku\* and Christopher J. Borgen\*\*

Just over ten years ago, Germans tore down a wall that divided their country and the whole of Europe. Stepping through the hole in the Berlin Wall, they took the first steps towards the reunification of West and East Germany and the end of the Cold War. Today another wall is being torn down - that between purely domestic law and international law. Companies are engaged in international trade at ever increasing rates. Environmental degradation has proved to be a global problem that cannot be solved with uncoordinated local measures. Individuals worldwide are pressing their governments for the recognition of a common set of human rights.

These and other aspects of an increasingly interdependent world each present new challenges and opportunities for U.S. lawyers who must assess this evolving legal, regulatory, economic, and political context for their clients. United States law and the legal profession are each evolving due to globalization. Conversely, U.S. law and the legal profession each play a part in fostering globalization. This trend towards increased interdependence should make the internationalization of law school curricula a priority for the academy so that its students may meet the challenges of modern legal practice. Such internationalization would include not only increased analysis of foreign law, but also of public and private international law. As other commentators have focused on the need for U.S. lawyers to study comparative law,<sup>1</sup> this article will focus instead on the

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1. See, e.g., ABA Section of International Law and Practice Spring Meeting

intertwining of international law and domestic law and the importance of assessing this relationship as part of one's legal education.

Lawyers trained in U.S. law schools learn that the Constitution gives Congress the power "[t]o define and punish . . . offenses against the Law of Nations."<sup>2</sup> Some might also be able to cite the oft-quoted dicta from the Supreme Court's decision in *The Paquete Habana* that "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>3</sup> But what does this mean for today's practitioner? One century after *Paquete Habana*, we ask what is international law, how does it affect U.S. legal practice, and how should the law schools prepare their students?

This article will proceed with the following main arguments:

1. What we call "international law" is currently in a period of rapid transformation;
2. It is more important than ever that graduating law students have at least a basic knowledge of the structure and instruments of public and private international law, as well as comparative law, because:
  - a. International law is increasingly part of the U.S. lawyer's world, whether they know it not; and,
  - b. U.S. law has been and continues to be a defining feature of international law.

By assessing how the practice of law is evolving, this article hopes to provide signposts for ways in which the academy should adjust the methods and substance of legal education.

#### I. The Convergence of Public International Law, Private International Law, and Comparative Law

The term "international law" has been used at various times to describe public international law, private international law, comparative law and international business law.<sup>4</sup> Historically,

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Symposium: "Law Schools and International Law: Curricula, Practice and Opportunities—Coordinating the Needs of Law Schools and Law Students with the Dynamics of International Law Practice (April 12, 2000); Ernst C. Steifel and James R. Maxeiner, *Why are U.S. Lawyers Not Learning from Comparative Law*, LIBER AMICORUM FOR THOMAS BÄR AND ROBERT KARRER 213 (1997).

2. U.S. CONST. art. I, § 8, cl. 10.

3. *The Paquete Habana*, 175 U.S. 677, 700.

4. See, e.g., John A. Barrett, Jr., *International Legal Education in U.S. Law*

there have been two divisions in the field: one between private international law - conflicts of law, international business transactions and the like - and public international law, "the law which regulates the intercourse of nations."<sup>5</sup> Anecdotal evidence suggests that U.S. students and practitioners have traditionally been more responsive to learning private international law because it seems more "real world" than the supposedly academic public international law. There has also been a divide between international lawyers in general and comparativists who study the similarities and differences of different domestic legal cultures.<sup>6</sup> While in the past there was a certain division between these specialties, this article argues that today the U.S. practitioner is likely to need to be competent in each of these facets of what one can broadly term "international law." Thus, while this term has usually referred to *public international law* and focused on nation states rather than peoples, business entities, and individuals,<sup>7</sup> this classic, Westphalian definition of international law is under pressure from the realities of modern practice.

For example, public international law itself is increasing in breadth of subjects. As the Honorable Rosalyn Higgins, a judge on the International Court of Justice and a former Professor of International Law at the London School of Economics, explained, public international law today is best understood as applying to

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*Schools: Plenty of Offerings, But Too Few Students*, 31 INT'L LAW. 845, 846 (1997).

5. BLACK'S LAW DICTIONARY 733 (5th ed. 1979).

6. In discussing the "atomization" of international law, Prof. James Feinerman of Georgetown University Law Center has argued that public international law has proceeded in one direction, international economic law in another and comparative law in a third. James Feinerman, Address at ABA Section of International Law and Practice Spring Meeting Symposium: "Law Schools and International Law: Curricula, Practice and Opportunities - Coordinating the Needs of Law Schools and Law Students with the Dynamics of International Law Practice (April 12, 2000) (all references to the Spring Meeting Symposium are derived from Christopher Borgen's notes on the panel discussion); see also Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1621-22 (1995) (stating that "[w]e are still stuck with a separation of international law from comparative law and of both of these from the customary law of communities that transcend national boundaries.").

7. Black's Law Dictionary defines "international law as [t]he law which regulates the intercourse of nations; the law of nations." BLACK'S LAW DICTIONARY, *supra* note 5. This formulation is related to the original definition proposed by Jeremy Bentham, who coined the English term "international law." See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); Mark W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405 (1984); Berman, *supra* note 6, at 1617-18.

international organizations as well as states and, in some circumstances, it applies to individuals as well.<sup>8</sup>

International law, broadly understood, arises out of more than just treaties and U.N. documents.<sup>9</sup> The building blocks of international law include a wide range of activities and regimes such as domestic statutes with extraterritorial application, the transnational coordination of regulatory agencies, and the treatment of aliens by foreign governments.<sup>10</sup> In sum, today's lawyer is increasingly involved in what some commentators have called transnational law, a term coined by Phillip Jessup "to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included as are other rules which do not wholly fit into such standard categories."<sup>11</sup> The disciplines of public international law,

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8. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 12-13 (1994). As an example of international law being increasingly applied to individuals, consider the increase in international criminal prosecutions under the criminal tribunals for the former Yugoslavia and Rwanda as well as the planned International Criminal Court.

9. The classic list of sources of international law is in Article 38 of the Statute of the International Court of Justice which states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38 (1).

10. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); HENRY J. STEINER, DETLEV F. VAGTS & HAROLD KOH, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXTS* (4th ed. 1994).

11. PHILLIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956). Jessup viewed this law as encompassing relations between states, between individuals and between states and individuals, he wanted a term which would identify "thee law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching up to the so-called 'family of nations' or 'society of states.'" *Id.* at 1. For a discussion of Jessup's conception, see Berman, *supra* note 6 at 1618-19; Anne-Marie Slaughter has chosen narrower definition, setting the bounds of transnational law as "all municipal law and a subset of intergovernmental agreements that directly regulate transnational

private international law and comparative law are overlapping to a greater and greater extent.<sup>12</sup> Thus, at issue is not simply the law of interstate relations *or* the law of international business transactions *or* comparative law, but the web of legal regimes between and within countries which is the result of the era of globalization. Harold Koh has called this

transnational legal process. . .whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations. . . Instead of focusing exclusively on issues of "horizontal jawboning" at the state-to-state level as traditional international legal process theories do, a transnational legal process approach focuses more broadly upon the mechanisms of "vertical domestication," whereby international law norms "trickle down" and become incorporated in domestic legal systems.<sup>13</sup>

The vertical interactions are the means in which domestic and international law affect one another, each causing an evolution in the other. Vertical interactions emphasize the need to be versed in public and private international law as well as comparative law. Realizing that international law is comprised of many different types of legal instruments emanating from many different types of actors—including legislatures, judiciaries, administrative bodies and international organizations—international law may be best thought of as a process, rather than a precise corpus. As Rosalyn Higgins has explained "When . . . decisions are made by authorized persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what

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activity between individuals and between individuals and state governments." Anne-Marie Slaughter (Burley), *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 230 (1993). See generally Steiner, Vagts & Koh, *supra* note 10.

12. See, e.g., ANDREAS LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 5 (1993) (stating that "in many ways the barriers between public and private international law have broken down, and the overlap or gray areas between public and private law, and public and private international law continue to grow").

13. Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 625-26 (1998) (internal citations omitted) (hereafter "*Bringing Home*").

occurs is legal decision-making. In other words, international law is a continuing process of authoritative decisions. . . ."<sup>14</sup>

In the last ten years, the process of international law has expanded with the proliferation of phenomena such as international tribunals,<sup>15</sup> bilateral investment treaties,<sup>16</sup> international environmental norms,<sup>17</sup> as well as the increasing vitalization of human rights law.<sup>18</sup> The twin impetuses for this evolution have been a deepening and broadening of globalization and the end of the Cold War.<sup>19</sup> Globalization is a term that has been used to describe a variety of phenomena such as the strengthening of the ties of economic interdependence, the increasing significance of nonstate actors, the deterioration of the Westphalian state system and a new perception of the common problems of humankind. For the purposes of this article, however, the key aspects of globalization are the increased interaction

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14. Higgins, *supra* note 8, at 2 (quoting R. Higgins, *Policy Considerations and the International Judicial Process*, 17 Int'l & Comp. L. Q. 58, 58-59 (1968)).

15. The 1990's saw the establishment of, among other tribunals, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Tribunal for the Law of the Sea, the World Trade Organization Dispute Settlement Understanding and the World Bank Inspection Panel. Moreover, there has also been a trend towards increasing use of international tribunals and courts in general. Thus we find not only more tribunals, but, generally, increasing use of each tribunal and consequently a significant expansion of international caselaw. *See, generally*, Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, in 271 RECUEIL DES COURS 101 (1998); *see, also*, Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999); *Developments in International Criminal Law*, 93 AM. J. INT'L L. 1 (1999).

16. *See, e.g.*, Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995); Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621 (1998).

17. *See, e.g.*, EDITH BROWN WEISS AND HAROLD K. JACOBSON, EDS., *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* (1998).

18. The growth of human rights law through U.S. courts was spurred by the 1980 Second Circuit decision *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that revitalized the use of the Alien Tort Claims Act, allowing foreigners to sue in U.S. courts for violations of their human rights. *See, e.g.*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 772 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). Moreover, if one includes the international criminal law as an adjunct to human rights law, then jurisprudence in this area has increased greatly through the establishment of new international criminal tribunals and the negotiations for the proposed International Criminal Court. *See* footnote 15.

19. Romano, *supra* note 15, at 728-38.

across national boundaries by economic, political and other actors and the increasing difficulty for any single nation to regulate or address certain public policy issues such as economic activity, environmental degradation or the spread of disease.<sup>20</sup> This, in turn, has led to the proliferation of international norms in a variety of areas and - in cases where transborder interactions have caused international problems - international regulatory coordination and problem-solving.<sup>21</sup> The spread of economic activity is often followed by a spread in legal and regulatory activity; that is, the internationalization of the economy has helped foster the internationalization of law. Thus, as globalization increased, one may note the broadening and deepening of the European Union, as well as the establishment of NAFTA and the WTO. Moreover, besides spurring international organization formation, increased state interaction leads to a larger base of activities from which one may discern consistent state practice, one of the components for emergent customary international law.

This internationalization of law in turn has led to a similar internationalization of the legal profession. As Professor Stephen Mayson of the Centre for Law Firm Management at Nottingham Law School explains, “[g]lobalization is one of the current ‘big issues’ in legal practice.”<sup>22</sup> Essentially, “[a]s clients move abroad,

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20. Adele Blackett notes the problem of defining globalization:

At the heart of the ambiguity of globalization lies one simple question: “What is it?” However, its terrain may well be too multifaceted and contested to be reduced to a unifying definition that captures anything more meaningful than the externalization of matters that were once considered to be purely national.

Adele Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUMBIA J. TRANSNAT’L L. 57, 60 (1998).

She further argues:

Recognizing the breadth of the claims made by globalization theorists only magnifies the ambiguities. Globalization proclivities vary in form and importance between diverse domains of the economies of specific parts of the world, as well as in politics, culture and religion. If all of this can be called globalization, yet the concept is to retain some meaning, then it must at least be acknowledged that it encompasses multifaceted, multilayered and often disjunctive processes.

*Id.* at 64.

21. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); ROBERT O. KEOHANE AND JOSEPH S. NYE, JR., *POWER AND INTERDEPENDENCE* (1977).

22. Christopher Stoakes, *The Global Imperative*, Euromoney Magazine (October 1999) at <http://www.euromoney.com/contents/publications/>



so do their lawyers.”<sup>23</sup> Moreover, this recognition of interdependence in general has contributed to the use of legal or quasi-legal regimes to address environmental protection, human rights and other topics.<sup>24</sup>

However, these efforts at international coordination probably would not have been realized but for the new possibilities for cooperation made possible by the end of the Cold War. While globalization gave a reason for the further internationalization of law, the end of the Cold War provided the opportunity for the growing use of such legal regimes due to (a) broader international cooperation, especially between the U.S. and Russia, which in turn revitalized the United Nations and (b) a refocusing of developed-country policymaker attention from military regimes to economic regimes. Thus, the establishment of the World Trade Organization and the evolution of international trade law, the increasing emphasis on the importance of international environmental and labor norms and the proliferation of international criminal tribunals were made more likely by the twin pistons of globalization and increasing international cooperation after the Cold War.

Considering these driving forces, “international law” - a once esoteric and theoretical discipline relegated to a small priesthood - is actually at the center of the main trends affecting the modern legal profession. The effects of internationalization are especially evident in the European Union, where an attorney is often expected to be competent not only in the legal system of his or her native country, but also to be well versed in the legal systems of other E.U. members as well as in the overarching structure of E.U. regulations.<sup>25</sup> Witness the trend towards large cross-border law firm and accounting firm mergers in Europe, which recently has begun to have some effects in the U.S. as well.<sup>26</sup> The United States, an immigrant nation and the largest single-country economy in the world<sup>27</sup> is not immune to the effects of

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[euromoney/em.99/em.99.10/em.99.10.18.html](http://euromoney/em.99/em.99.10/em.99.10.18.html) (last visited March 16, 2000).

23. Barrett, *supra* note 4, at 847.

24. See *supra* text accompanying notes 15-18.

25. See, e.g., Blackett, *supra* note 20, at 73 (noting particular interest of students of E.U. member states in mastering the law of the European Union, perhaps moreso than in learning the law of other member states).

26. Morton Moskin, *As the World Shrinks: Don't Let Globalization Leave You Behind*, BUS. L. TODAY, Jan./Feb. 2000, at 38, 40.

27. THE ECONOMIST: POCKET WORLD IN FIGURES 38 (2000). The United States, with a gross domestic product of approximately \$7.8 trillion, is the largest

internationalization; on the contrary, it is especially effected by it. NAFTA, the WTO and the mushrooming of international litigation in U.S. courts and international arbitration with U.S. parties are only a few reasons why the basic skillset required by lawyers has expanded.<sup>28</sup> Legal education needs to match this progression of the discipline.

## II. U.S. Legal Education in an Age of Globalization.

U.S. lawyers who can think about law on a comparative basis or who have a knowledge of international legal norms are sought after internationally and play an important part in fostering the rule of law within and among nations. Taking part in the world of international law is a natural extension of the American credo of being a nation of laws, not men. However, it is a task for which lawyers must be adequately prepared. The American Society of International Law, the International Law Association, the American Bar Association and other organizations all play a part in providing resources to lawyers encountering international law - either for the first time or in an ongoing practice. But the preparation needs to start earlier, in the law schools. There has been an increase in law school classes that assist students who may enter fields ranging from investment banking to community development; this trend shows a flexibility and willingness of law schools to enter fields which may be beyond their traditional curriculum. International law - both public and private needs to be viewed in the same way. U.S. legal education, however, has been "lagging far behind on the 'global playing field.'"<sup>29</sup>

Consider the world into which today's law graduates are entering:

- A recent survey names America as the most internationalized country in the world (based on trade and investment flows);<sup>30</sup>
- International institutions - ranging from NAFTA and the

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single economy in the world, assuming one does not aggregate the national economies of the European Union. *Id.*

28. See, e.g., Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1497-98 (1991) ("[t]he increasing importance of inter-national trade to our economy and the consequent increase in international litigation in our courts require lawyers who are equipped to meet the special demands that such litigation imposes.").

29. Blackett, *supra* note 20, at 59. (Another commentator noted that, compared to MBA programs at major business schools, law schools are far behind the curve). See also, Feinerman, *supra* note 6.

30. THE ECONOMIST: POCKET WORLD IN FIGURES, *supra* note 27, at 70.

- WTO to the International Criminal Court and the UN - are playing a larger role than ever in American public life; and,
- People the world over look to the United States for advice in the construction of international and domestic legal institutions.

The reason for exploring comparative law is clear enough: “[b]y studying the laws of other societies, one will be better prepared to assist one’s clients in international transactions,”<sup>31</sup> not to mention that such knowledge is crucial in international litigation. Yet, even though a knowledge of comparative law would be of great use to American lawyers, it is unfortunate to note that the U.S. legal profession has less expertise today in comparative law than it did in previous generations. Ernst C. Steifel and James Maxeiner observed:

The United States pays comparative law no mind... Comparative law has less importance in the U.S. today than it did a generation ago, and, less than it did in much of the nineteenth century. While there has never been a golden age of comparative law in America, Basil Markesinis noted that central European émigré scholars did achieve “phenomenal success” in the 1950’s, and 1960’s when they made comparative law a “recognized, even admired, topic at a time when there was really little practical need for it.” Unfortunately, he laments that it “flounder[s] at a time when a shrinking world needs it more than ever.”<sup>32</sup>

Moreover, “[w]hile many courses may appear in catalogues, ‘virtually nobody - only a handful of students - actually take these courses. The vast majority of American law students graduate in complete ignorance of comparative law.’”<sup>33</sup>

Similarly, while American lawyers would gain through the study of public international law given the vertical interplay of domestic and international law and since “[u]nderstanding public international law provides a useful grounding in both the nature and source of one’s government’s power as well as the limits of that power,”<sup>34</sup> public international law is studied by relatively few students.<sup>35</sup>

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31. Barrett, *supra* note 4, at 848.

32. Steifel and Maxeiner, *supra* note 1, at 214-15.

33. *Id.* at 223.

34. Barrett, *supra* note 4, at 849.

35. Jeff Lehman, Address at ABA Section of International Law and Practice Spring Meeting Symposium (April 12, 2000).

A recent ABA study examined international law and the American law school.<sup>36</sup> The study defined international law broadly, including “traditional public international law, comparative law and international business law.”<sup>37</sup> The survey found that, although “almost all” U.S. law schools have at least one international law class and “almost all” have multiple international law offerings, with 90% of the respondent schools stating that they had five or more such courses, at most 37% of the students of responding schools had taken any international law.<sup>38</sup> Moreover, if one corrects for schools with high percentages, then one finds that “at most law schools across the United States, fewer than 20 percent of graduates take a course in international law.”<sup>39</sup>

But the problem is more complex than simply the number of international or comparative law courses available (though that, too, is a problem). The underlying issue is one of students not actually taking these courses. As one law school dean recently noted, prospective students often ask about the international law curriculum and alumnae emphasize the need for more international training to prepare for practice and there has been a proliferation of international courses, but not an increase in enrollment among students.<sup>40</sup>

As many have suggested, the real solution may not be a proliferation of international law courses that will be chosen by the same self-selected group of students, but rather an integration of international and comparative issues into traditionally “domestic” course areas.<sup>41</sup> For example, most students study the case *Swift v. Tyson* in first year civil procedure class in learning about state law in the federal courts. However, *Swift* also “clarified that the bill of exchange rule derived from *Lex Mercatoria* constituted part of the ‘general common law’ to be interpreted by federal courts sitting in diversity jurisdiction.”<sup>42</sup>

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36. See generally Barrett, *supra* note 4.

37. *Id.* at 846.

38. *Id.* at 853-54.

39. *Id.* at 854.

40. Lehman, *supra* note 35.

41. Jon L. Mills, Address at the ABA Section of International Law and Practice Spring Meeting (April 12, 2000); Blackett, *supra* note 20, at 72.

42. Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harvard Law Rev. 1824, 1830-31 (1998) (citations omitted) [hereinafter *State Law*]. *Lex Mercatoria* is a term used to denote international commercial customs, which have taken on the force of customary international law. See Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transaction* (*Lex Mercatoria*), 19 Harv. Int'l L.J. 221 (1978).

Similarly, *Pennoyer v. Neff*,<sup>43</sup> a standard civil procedure case, is another example of how “our domestic constitutional law of jurisdiction (full faith and credit and due process) was shaped by, or at least in terms borrowed from, international law.”<sup>44</sup> Much the same can be said concerning classic U.S. choice of law theories of Brainerd Currie and Joseph Beale.<sup>45</sup> Such cases show how international rules and national rules affect one another, and are particularly useful for both introducing the student to international legal issues and for deepening the student’s understanding of the U.S. legal process.<sup>46</sup> The law school curriculum should be internationalized because the substance and the practice of law in the United States is itself being

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43. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

44. *Burbank*, *supra* note 28, at 1458 (citation omitted).

45. *Id.* at 1458-59.

46. Concerning theoretical perspectives, the “legal process” school of Hart, Wechsler, and subsequent academics, has influenced many international legal theorists, especially in understanding issues of legitimacy in international law and international law and process. Such theoretical perspectives can also be compared and contrasted in U.S. law school classes such as Constitutional Law, Legal Institutions and Federal Courts, to name a few. Regarding the U.S. legal process school, see Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, David L. Shapiro, Hart and Wechsler, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3rd ed. 1988); and Akhil Amar, *Law Story*, 102 HARV. L. REV. 688 (1989). Concerning certain process-based theories on international lawmaking, see Harold D. Lasswell & Myres S. McDougal, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992); Myres S. McDougal & W. Michael Reisman, *INTERNATIONAL LAW ESSAYS* (1981); Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991 (1995); Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT’L L. 60 (1972); Abram Chayes, Thomas Ehrlich and Andreas F. Lowenfeld, *International Legal Process: Materials for an Introductory Course* (1968); Abram Chayes & Antonia Handler Chayes, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Thomas M. Franck, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); Higgins, *supra* note 8 and Harold Hongju Koh, *Why Nations Obey*, 106 YALE L.J. 2599 (1997). Note that Koh contrasts the Chayes’ work as an example of a “process” approach to international jurisprudence with Franck’s as an example of a “philosophical” approach. *Id.* at 2602. However, in the manner that we are concerned with “process” in this article, the New Haven School theorists, Chayes et al., Franck, Higgins and Koh are all concerned with methods of the process by which international law is made, although different authors emphasize different aspects of process, such as who is competent to make law, when is the process legitimate and how the domestic and international aspects of process affect one another. The underlying point, though, is that all of these authors have a relationship to the U.S. “legal process” school and, in turn, U.S. students can take these new insights and consider U.S. lawmaking in light of the work of these and other internationalists.

internationalized. To better understand the issues facing the academy, it is useful to consider two major trends in the profession: the influx of international legal issues into what had been considered purely domestic preserves and the role that domestic law plays in the formation of international law.

### III. The Internationalization of Domestic Law.

Although in recent years attention has been added to the proliferation of international legal issues in U.S. practice, in truth, U.S. domestic law and international law have interacted since the birth of the Republic. Treaties are the supreme law of the land. The Founding Fathers often mentioned the "law of nations," and the *Paquete Habana* is a century-old decision.<sup>47</sup> However, while there is a long tradition of interrelation between domestic and international law, it has not always been perceived by the many U.S. lawyers who view their practice as being purely domestic. This is a perception which is difficult to maintain as international law comes into play in greater varieties of cases. A review of recent headlines on a variety of topics including U.S. constitutional law, torts, criminal law, commercial law, and environmental law provides examples of the interlacing international law and U.S. domestic law that is a key factor in the evolution of the practice of law in the U.S. Consider the following as examples of how international legal issues have arisen in places which were traditionally considered the domain of domestic law:

#### A. *The U.S. Constitution and Federalism: The Massachusetts/Burma Case*

One case of recent prominence is *Crosby v. National Foreign Trade Council*, the so-called Massachusetts/Burma Case, which was recently decided by the U.S. Supreme Court.<sup>48</sup> At issue was whether a Massachusetts law prohibiting the Commonwealth and its government agencies from purchasing goods or services from individuals or companies that engaged in business with or in Myanmar (formerly Burma) was an unconstitutional interference

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47. See *supra*, notes 2 and 3.

48. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998) *aff'd sub nom.* *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1<sup>st</sup> Cir. 1999) *aff'd sub nom.* *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000).

with the power of the federal government to conduct foreign affairs.<sup>49</sup>

In April 1998, the National Foreign Trade Council had filed suit in the District of Massachusetts charging that the law was unconstitutional because, among other reasons, it intruded on the federal government's exclusive power to regulate foreign affairs. Briefings before the District Court by the parties and the *amici*, which included the European Union, Japan and the Association of South East Asian Nations, considered whether the Burma law would impede the United States from honoring its international obligations under the World Trade Organization, interfered with U.S.-E.U. relations and threatened a proliferation of such laws which would aggravate international tensions.

The District Court ruled in favor of the plaintiffs and found that the Massachusetts/Burma law impermissibly burdened U.S. foreign relations. The First Circuit affirmed. The case was then argued before the Supreme Court, which, in a unanimous decision, held that the Massachusetts law was preempted by federal law. Commentators have noted that this is a relatively narrow holding and that there may be subsequent cases concerning other similar state statutes.<sup>50</sup>

What is striking is the manner in which Massachusetts procurement regulations, the foreign relations power and public international law all came to bear on each level of this case. This is but one example of how U.S. constitutional law and international relations meet in the economic realm.<sup>51</sup> Besides

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49. Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 878, 898-99 (1999); see also Steven R. Jenkin, *National Foreign Trade Council v. the Commonwealth of Massachusetts: A State Acting as a "Market Participant" Should Trump the Federal Government's Right to Regulate Foreign Affairs Unless Congress Expressly Declares Otherwise*, 14 CONN. J. INT'L L. 593, 601-05 (1999). On a similar issue, see *Zschernig v. Miller*, 389 U.S. 429 (1968) (invalidating an Oregon statute which prevented citizens of "Iron Curtain" countries from inheriting land within the state).

50. See Peter J. Spiro, ASIL Insight: U.S. Supreme Court Knocks Down State Burma Law, available at <http://www.asil/insights.htm> (last visited June 23, 2000).

51. The extraterritorial application of antitrust regulation and sanctions against companies who undertake certain types of trade with Cuba are two other examples. Concerning antitrust, see, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); Keith Highet et al., *Decision: Hartford Fire Insurance Co. v. California*, 88 AM. J. INT'L L. 109 (1994); Scott A. Burr, *The Application of U.S. Antitrust to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity*, 15 U. PA. J. INT'L BUS. L. 221 (1994); regarding the so-called "Helms-Burton Law" concerning trade with Cuba, see Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, in *Agora: The Cuban Liberty and Democratic*

economic relations, one can find international law issues in cases concerning issues as seemingly domestic as the level of punitive damages in tort awards.

### B. State Tort Law: Loewen

In the *Loewen* case,<sup>52</sup> which has gained much attention from the press and even earned an article in the *New Yorker*,<sup>53</sup> a Mississippi funeral home owner sued the Loewen Group, a Canadian funeral home franchise, for driving it out of business through bad faith negotiations and antitrust violations. The Mississippi state court jury awarded the plaintiff \$100 million in compensatory damages and \$400 million in punitive damages.<sup>54</sup>

The Loewen Group decided to appeal and learned that under Mississippi state law, a judgment debtor wishing to appeal must post a bond of 125% of the judgment (\$625 million).<sup>55</sup> It ended up settling the case for about \$150 million.<sup>56</sup>

The story does not end there, however. Rather, the focus shifts to the NAFTA Dispute Resolution Mechanism which allows a party to seek recourse before the International Centre for the Settlement of Investment Disputes (ICSID).<sup>57</sup> On November 19, 1998, the Loewen Group filed such a claim against the United States.<sup>58</sup>

Thus, a Mississippi state court case concerning funeral home franchising has evolved into an arbitration before a World Bank tribunal. The issue is whether the level of punitive damages awarded by a Mississippi jury, and Mississippi's appeals bond

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*Solidarity (Libertad) Act*, 90 AM. J. INT'L L. 419 (1996); Brice M. Clagett, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act: Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434 (1996).

52. The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Case No. ARB(AF)/98/3).

53. See Jonathon Harr, *The Burial*, THE NEW YORKER, Nov. 1, 1999, at 70.

54. Public Citizen, *Briefing Paper: Canadian Corporation Found Liable in Mississippi Courts Uses NAFTA to Claim Legal System Violated its Rights*, available at <http://www.harmonizationalert.org/NAFTA/loewen.htm> (last visited May 30, 2000).

55. *Id.*

56. *Id.*

57. North American Free Trade Agreement, Dec. 17, 1992, Chapter 11, art. 1120, 1992 WL 812394. ICSID was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

58. See World Bank Group, ICSID List of Last Pending Cases, available at <http://www.worldbank.org/icsid/cases/pending.htm> (last visited May 30, 2000).



requirement, denied the Canadian judgment-debtor fair and equitable treatment under international law, thereby causing an effective expropriation that must be compensated by the United States. Clearly, international law is becoming increasingly intertwined in U.S. legal practice.

### C. Domestic Criminal Procedure: Breard

Perhaps the most famous recent cases relating to the intersection of international and domestic law in the U.S. are the "Vienna Convention Cases" where foreign national death row inmates appealed their convictions on the grounds that in contravention of the Vienna Convention of Consular Relations, their national consulates had not been notified of their arrest.<sup>59</sup>

The story of Francisco Breard is possibly the most well known of these cases.<sup>60</sup> On September 1, 1992, a Paraguayan citizen, Angel Francisco Breard, was arrested in Virginia on suspicion of murder. He was tried and convicted and on August 22, 1993, he was sentenced to death. Efforts to appeal the conviction in the United States were unsuccessful. The Republic of Paraguay then filed an application before the International Court of Justice ("ICJ"), arguing that the United States failed its obligation to advise Breard without delay of his right to consular assistance upon his arrest in Virginia, contrary to its obligation under the Vienna Convention on Consular Relations.

The ICJ held a hearing on April 7, 1998 and issued an order April 9 stating that the U.S. should take all measures at its disposal to ensure that Breard not be executed pending the final decision of the proceedings. As the ICJ proceeding was moving forward, Paraguay and Breard filed petitions for writs of *certiorari* before the U.S. Supreme Court to stay the execution.

On April 13, 1998, Secretary of State Madeleine Albright asked the Governor of Virginia to stay the execution in light of the

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59. Recent such cases include *Federal Republic of Germany v. United States*, 119 S. Ct. 1016 (1999); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986 (S.D. Cal. 1999); *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999); see generally William J. Aceves, *International Decision: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924 (1999).

60. The decisions concerning Breard's appeals of his sentence are at *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998), *cert denied sub nom.* *Breard v. Greene*, 523 U.S. 371 (1998); the decisions relating to the Vienna Convention case filed by the Republic of Paraguay may be found at *Republic of Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998), *cert denied sub nom.* *Breard v. Greene*, 523 U.S. 371 (1998).

April 9 ICJ order granting provisional measures.<sup>61</sup> On the same day, the Department of Justice and the Department of State filed *amicus* briefs against the petitions for *certiorari*.<sup>62</sup>

On April 14, the Supreme Court denied the petitions for *certiorari*. Later that day, the Governor of Virginia decided not to stay the execution. Breard was executed.<sup>63</sup>

*Breard* and similar cases involving foreign nationals currently before U.S. courts pose questions about how the United States should order its domestic affairs in light of its international obligations and how seriously it should take those obligations.

#### D. Environmental Law: NAFTA and Methanex

Methyl Tertiary-Butyl Ether (MTBE) is a gasoline additive believed to be a significant risk to the environment through groundwater contamination.<sup>64</sup> The Governor ordered MTBE to be phased out of use in California no later than December 31, 2002.<sup>65</sup> Methanex Corporation, a Canadian company with facilities in the United States, manufactures methanol, 40% of the U.S. sales of which are to companies which use the methanol to produce MTBE.<sup>66</sup> Relying on Chapter 11 of the North American Free Trade Agreement, which allows an investor from a signatory country to file a claim against another signatory country,

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61. Sean Murphy, *Contemporary Practice of the United States Relating to International Law: Execution of Paraguayan National Who Was Not Notified of Right to Consular Access*, 93 AM. J. INT'L L. 161, 172 (1999). The Secretary's letter stated that going forward with the execution could be seen as "a denial of the United States of the significance of international law and the [International Court of Justice's] processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad." Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998) (partially reprinted in 92 AM. J. INT'L L. 666, 671-72 (1998), quoted in Murphy, *supra*, at 172).

62. Murphy, *supra* note 61, at 172.

63. *Id.*

64. See University of California Toxic Substances Research & Teaching Program, Health and Environmental Assessment of MTBE: Report to the Governor and Legislature of the State of California as Sponsored by SB 521 (Nov. 12, 1998), available at <http://www.tsrtpt.ucdavis.edu/mtberpt/homepage.html> (last visited May 31, 2000).

65. Executive Order D-5-99, issued by Governor of California Gray Davis (March 25, 1999), available at <http://www.calepa.ca.gov/programs/mtbe/eotasks.htm> (last visited May 30, 2000).

66. Methanex Corp. Notice of Intent to Submit A Claim to Arbitration Under Article 1119, Section B, Chapter 11 of the North America Free Trade Agreement (July 2, 1999), available at [www.methanex.com](http://www.methanex.com) (last visited May 30, 2000).

Methanex filed a suit against the state of California alleging approximately \$970 million in damages.<sup>67</sup> Consequently, the U.S. is now arbitrating before an international tribunal whether a California state law is an effective expropriation of a Canadian company's economic interest. Such private rights of action by individuals and companies against states on claims of alleged expropriation are a significant shift in the balance of power between states and subnational actors.

*E. The WTO, Seattle and American Business*

Finally, if there is any doubt as to the importance of public international law to domestic affairs, simply consider the recent events surrounding the U.S. and the WTO. Besides the tumult surrounding the WTO ministerial in Seattle, the United States has recently lost a case which could cause the U.S. to rewrite key tax provisions in the Internal Revenue Code or face significant sanctions.

The "Battle in Seattle" was an argument about international law. The delegates and protestors who came to Seattle were essentially disagreeing about either the role that international obligations should play in domestic affairs or - if not the role - then the content of the obligations in the WTO system. Both questions - whether the U.S. should be a member of an international trade regime and what the content of a particular regime ought to be - are the types of questions on which lawyers are routinely consulted. For some, the WTO is controversial not so much for what it does - regulate trade - but for how it does it - by using supranational arbitral panels. Particularly troubling to some is that these panels make trade politics more legalistic and that under such circumstances the U.S. could lose a dispute and be told that it must change its domestic law or face sanctions.

Such was the case in a suit by the European Union against the U.S. regarding the use by the U.S. of foreign sales corporations (FSC's). The FSC provision allowed U.S. corporations to have foreign operations and sales without fear of taxation by U.S. authorities. The European Union claims that these U.S. tax law provisions amount to prohibited export subsidies.<sup>68</sup> Changing the FSC tax-exempt status may have a significant effect on profits for

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67. *Id.*

68. U.S. Trade Rep., Highlights in U.S. International Trade Dispute Settlement (October 2, 2000), available at <http://www.ustr.gov/enforcement/high.pdf> (last visited October 19, 2000).

certain multinational corporations. The arbitral panel found that the U.S. tax provisions which allowed FSC's to operate on a tax-exempt basis was illegal under the GATT.<sup>69</sup> If the U.S. does not comply with the ruling or negotiate some other settlement with the European Union, U.S. companies could face \$3.5 billion in sanctions from the European Union. International law thus is having very real, bottom-line impact for U.S. business.<sup>70</sup>

Although the American public may not always realize it, increasingly it is arguing with itself about the role of international law. Answering the questions posed by *Breard*, *Loewen* and the *Burma* case will require informed debate by advocates and consideration by jurists all of whom understand the interplay of criminal constitutional, and international law.

Besides assisting in the development of international law in the U.S., American lawyers have an increasingly important role to play internationally.

#### IV. The Impact of U.S. Domestic Law on International Law.

The relationship between domestic and international law is a two way street. As theorists of transnational law have shown, the domestic laws of a state can have impact on the content of public international law and can also be used as a model by other countries in drafting their own domestic laws. U.S. legal culture and the American bar have profoundly affected a whole range of foreign and international legal regimes through three main conduits: (a) providing models for international legal regimes; (b) acting as an example for foreign countries; and, (c) assisting in the evolution of public international law through vertical linkages. The role of U.S. law and the legal profession in such areas is another reason that U.S. lawyers should receive training in international law, broadly defined.

Due in part to the U.S. role as a drafting party of numerous international regimes, the structure of many regimes contain provisions which are similar to U.S. domestic analogues. For example, the Convention for the International Sale of Goods borrowed certain concepts from UCC Article 2. The investment protection measures of NAFTA are based in part on U.S. bilateral investment treaties. Adding another level to this relationship, the investment protection regime of the proposed Multilateral

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69. *A Tussle Over Tax*, THE ECONOMIST, March 4, 2000, at 75-76.

70. *Id.* at 75.

Agreement on Investment was similar to the NAFTA regime, and thus to U.S. bilateral investment agreements. The Universal Declaration of Human Rights has many similarities to the U.S. understanding of civil liberties. In cases such as these, U.S. domestic law has played a part in informing international law.

U.S. law has also influenced other domestic laws by way of example, especially in the cases of commercial and constitutional law. As Adele Blackett recently wrote in the *Columbia Journal of Transnational Law*:

there are reasons why, for example, Canadians and students in many other parts of the world study the Uniform Commercial Code (UCC) in basic Commercial Transactions courses, linked to the direct and indirect influence of the UCC on domestic and international legal systems. There are also reasons why French law students study U.S. Constitutional Law in their first-year constitutional law course. Some of these reasons may relate to the persuasive influence of that model. Others may simply or simultaneously embody the pedagogical goal of gaining insight into the varying ways in which different societies address comparable issues. Yet others may reflect on how legal actors in certain societies see themselves in a world that they perceive to be fundamentally interconnected.<sup>71</sup>

Anne-Marie Slaughter has noted that “[w]hen life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.”<sup>72</sup> Similarly, nations around the world look to the United States for advice on topics ranging from criminal procedure and civil rights to bankruptcy statutes and securities regulation.

Besides the use of U.S. domestic law as a model for international regimes or as an example for the municipal law of other countries, the U.S. legal system plays a part in the evolution of international law through what can be called vertical linkages. Harold Koh illustrates:

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71. Blackett, *supra* note 20, at 71. See also the work of the American Bar Association's Central and East Europe Law Initiative (CEELI) as an example of a U.S. N.G.O. playing an important role in advising foreign governments and assisting in the drafting of new laws, largely from a U.S. perspective.

72. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (footnotes omitted).

Take, for example, the federal common law rule of comity in international antitrust cases. This rule was first articulated as a principle of general common law, which then-Professor Kingman Brewster redefined in his international antitrust treatise as a so-called "jurisdictional rule of reason." In *Timberlane Lumber Co. v. Bank of America*, the Ninth Circuit applied Brewster's analysis to permit U.S. regulation of extraterritorial conduct through an interest-balancing test, which other federal courts then applied as a judicial "brake" on the extraterritorial exercise of U.S. prescriptive jurisdiction. In time, the American Law Institute's *Restatement (Third) of Foreign Relations Law* adopted *Timberlane's* interest-balancing test to aid determination of when a nation's exercise of prescriptive jurisdiction is or is not "reasonable," and the United States and foreign governments have begun to follow suit.<sup>73</sup>

One means of vertical linkage is the role of U.S. courts in settling a variety of transnational disputes, especially those concerning international finance or human rights. Some commentators "posit that U.S. courts have 'begun to develop a distinct, cohesive body of law' and that there is an 'emerging field of international civil litigation.'"<sup>74</sup> For an example regarding international human rights cases, see the Alien Torts Claim Act,<sup>75</sup> revitalized by the 1980 Second Circuit decision in *Filartiga v. Pena-Irala*.<sup>76</sup> The Act allows suits in the U.S. federal courts by and against foreigners on claims of human rights violations.<sup>77</sup> This is part of the process of elucidating human rights norms through case law. This link between domestic law and international norms was redoubled with the enactment of the Torture Victim Protection Act (TVPA),<sup>78</sup> the domestic enabling legislation for the

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73. Koh, *supra* note 42, at 1855-56 (citations omitted).

74. Burbank, *supra* note 28, at 1456 (citations omitted), quoting GARY B. BORN AND DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS*, at 1, 3 (1989).

75. 28 U.S.C. § 1350 (1994).

76. 630 F.2d 876 (2d Cir. 1980).

77. This had a real impact on the practice of public interest law in the United States. "Filartiga inspired public interest lawyers to raise similar claims, seeking to develop a human rights doctrine, document violations, instill fear in human rights abusers of eventual accountability, and provide at least symbolic relief to individual victims to assist them in their mourning or healing process." Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1,1,6 (1992) as quoted in Koh, *supra* note 13, at 664 n.201.

78. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992).

Convention Against Torture.<sup>79</sup> TVPA cases will thus be viewed as being important interpretations of international human rights law as well as U.S. domestic law. Thus, the U.S. federal courts are increasingly the forum of international litigation, causing a need for litigators to be well versed in different aspects of international law relating to international finance, trade and human rights, to list only three broad areas.

Another example is the prominent role of U.S. law in the area of international finance. The laws of the State of New York have historically been a common choice of law for international loan documents<sup>80</sup> and - if the dispute is settled before a court as opposed to through arbitration - the federal courts, especially the Southern District of New York, are often the forum of choice. As companies and countries are relying more on securities markets, one finds that U.S. securities regulations - and financial lawyers - are central to the undertaking.<sup>81</sup> Such practices play a part in what Harold Berman has called the "customary world law based on the contract practices of economic actors."<sup>82</sup> Such customary law is an

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79. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

80. *See, for example*, Moskin, *supra* note 26, at 40 (noting "[b]ecause financing for business growth has long been most readily obtainable in New York, dating at least to the post-Civil War years, the progression from a local to an international practice may have been easier for New York's corporate lawyers than for those admitted elsewhere.").

81. *See, e.g.*, David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 AM. J. COMP. L. 261, 273-74 (1998) stating "more project financing is moving away from banks and loans toward capital markets and bonds. These securities will be sold in the United States, which means that American corporate finance lawyers obtain part of this international business."

82. Concerning international law and the trade of goods, Berman writes

The law of world trade is, of course, regulated in part by international conventions as well as by the laws of national states. So far as its strictly commercial aspects are concerned, however, its primary source is in the patterns and norms of behavior of those who engage in it. International law and national law play a greater role in the regulation of foreign exchange transactions and direct foreign investment than in the regulation of world trade transactions. Yet a customary world law based on the contract practices of economic actors plays an important role even with respect to money and investment.

Berman, *supra* note 6, at 1620-21 (citations omitted).

At times, such vertical effects of U.S. law are bemoaned by observers from other countries. Jacques Chirac, the President of France, noted in a speech to the French magistrates that international law should be encouraged not to give primacy to what he called Anglo-Saxon law. Anne Fulda, *Chirac met en garde*

important aspect of the evolution of international law.

Generally speaking, then, the international community looks to how the U.S. orders its affairs. There is a historically important role for American lawyers in the construction of the international system. The question that remains is whether American lawyers are being trained adequately for the tasks and responsibilities they face in a legal system which is affected by and which effects globalization.

## V. Conclusion

While Tip O'Neill once said that "all politics is local," it is now becoming true that all politics are also global. President Bill Clinton has stated that the once bright line between domestic and foreign policy is blurring and that he almost wishes that people would stop talking about foreign policy and domestic policy as policy areas and instead focus on substantive issues such as economic policy, security policy, environmental policy, and so on.

As true as this is for public policy in general, it is especially true for the law. In this era of globalization and interdependence, there are few topics that are still purely "domestic" in nature. And if, to paraphrase Dean Claudio Grossman, the best lawyers are lawyers who see things that others do not see and thus form creative solutions,<sup>83</sup> then a lawyer who is practicing without at least a rudimentary knowledge of international law is practicing with a significant blindspot.

While a purely domestic curriculum was fine for an earlier point in our nation's history, we must train American lawyers to see the world as it is— and as it is becoming. Such vision requires the optic of international law, in all its varieties and hues.

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*contre law judiciarisation excessive de law société*, LE FIGARO, October 3, 1999, at 6.

83. Claudio Grossman, Address at ABA Section of International Law and Practice Spring Meeting Symposium: "Law Schools and International Law: Curricula, Practice and Opportunities— Coordinating the Needs of Law Schools and Law Students with the Dynamics of International Law Practice (April 12, 2000).



